

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Bair Hugger Forced Air Warming
Products Liability Litigation

MDL No. 2666
(JNE/FLN)

This Document Relates to All Actions

JOINT MOTION REGARDING
CONTINUED SEALING

Documents have been filed under temporary seal in connection with the following motions:

Defendants' Motion to Exclude the Opinions and Testimony of Plaintiffs' Engineering Experts Daniel Koenigshofer, Michael Buck, Said Elghobashi, and Yadin David (Doc. No. 794)

Pursuant to LR 5.6, the parties submit this Joint Motion Regarding Continued Sealing.

Dkt. No.	Description of Document	Mark "X" in Applicable Column		Nonparty That Designated Doc.	Reason Why Document Should Remain Sealed or Be Unsealed
		Parties Agree Doc. Should Remain Sealed	Parties Disagree Doc. Should Be Unsealed		
915	PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' ENGINEERING EXPERTS Redaction on P. 6 concerning safety verification testing of Model 750 Redaction on P. 47 regarding change to filter media in Model 505	X		Not Applicable.	<p>Plaintiffs' position. The Plaintiffs respectfully maintain there is a strong public interest afforded by both the First Amendment and common law in accessing court proceedings and records. <i>See, e.g., Ass. Press v. District Court</i>, 705 F.2d 1143, 1145 (9th Cir. 1983); <i>NBC Subsidiary (KNBC-TV), Inc., v. Superior Court</i>, 980 P.2d 337, 358 (Cal. 1999); <i>Mokhiber v. Davis</i>, 537 A.2d 1100, 1107 n.4 (D.C. 1988). As the party attempting to seek restrictions on public right of access to court proceedings, Defendants bear the burden of showing good cause to support access restrictions. <i>See Pansy v. Borough of Stroudsburg</i>, 23 F.3d 772, 785-86 (3d Cir. 1994)(noting good cause requires showing disclosure will cause a clearly defined and serious injury, which must be demonstrated with specificity)(quotations omitted). One of the relevant factors in considering whether to deny public access is whether confidentiality is being sought over information important to public health</p>

		<p>and safety. See <i>Glemede Trust Co., v. Thompson</i>, 56 F.3d 476, 483 (3d Cir. 1995).</p>	<p>Defendants made no attempt to seal the proceedings, and have failed to demonstrate with specificity any clearly defined and serious injury that satisfies good cause requirement for sealing the Court proceedings and files. As the Defendants are aware, the press was present and taking notes throughout the duration of the three-day hearing.</p>	<p>Defendants' position. These redactions should remain in place. The references reflect internal deliberations that are likely to cause competitive harm to 3M if publicly disclosed. The information was designated Confidential by Defendants pursuant to the Protective Order.</p>			

Redactions on pp. 80-84	X		Not Applicable.		
Redactions on pp. 87-90	X		Not Applicable.		
Redactions on pp. 93-94	X		Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p>	<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>
Redactions on p. 96		X	Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as</p>	

<p>nefarious and tainted by Augustine should be rejected.</p> <p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>	<p>Not Applicable.</p>	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p>	<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>
	<p>Redactions on pp. 98-100</p>		
	<p>Redactions on pp. 129-31</p>	<p>X</p>	<p>Not Applicable.</p>

Redactions on p. 136	X		Not Applicable.	
Redactions on pp. 138-144	X		Not Applicable.	
Redactions on p. 153	X		Not Applicable.	
Redactions on pp. 186-198	X		Not Applicable.	
Redactions on pp. 223-224	X		Not Applicable.	
Redactions on pp. 225-228	X		Not Applicable.	
Redactions on p. 245	X		Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p>

Redactions on pp. 255-56	X		Not Applicable.		
Redactions on pp. 275-77	X				
Redactions on pp. 277-283	X		Not Applicable.		
Redactions on p. 309		X	Not Applicable.		
					<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p>
					<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>

Redactions on pp. 318-322	<input checked="" type="checkbox"/>	Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p> <p>Defendants' position. These redactions should remain in place. The testimony concerns design and development of next-generation Bair Hugger warming system that is not at issue in this case. Public disclosure is likely to cause competitive harm to 3M.</p>
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916	Exhibit 3 to Declaration of Genevieve Zimmerman, draft clinical trial protocol	<input checked="" type="checkbox"/> Not Applicable.		<p>Plaintiffs' position. There is a strong public interest in disclosure of this document, which reflects [REDACTED]</p> <p>The document was read aloud and displayed on multiple occasions during the three day hearing, in an open courtroom with the press and public in attendance. This document contains information significantly important to public health and safety, and plaintiffs respectfully submit it should be unsealed.</p> <p>Defendants' position. This document should remain under seal. This draft protocol relates to a clinical trial that was never performed. Public disclosure is likely to cause competitive harm to 3M by revealing relationships with clinics and competitive positioning of pre-warming product.</p>	
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918	Exhibit 29 to Declaration of Genevieve Zimmerman, internal testing of upper body blanket temperature	<input checked="" type="checkbox"/> Not Applicable.	<p>Plaintiffs' position. This document contains the "Standard Temperature testing" done by Arizant in 2010 which was the ultimate source for the 106°F air temperature used for both Dr. Abraham and Dr. Elghobashi's CFD tests. Nothing about the temperature testing risks competitive harm or disadvantage to Defendants.</p> <p>Defendants' position. This document should remain under seal. This internal test document includes test results that may cause competitive harm to 3M if publicly disclosed.</p>
925	Exhibit 30 to Declaration of Genevieve Zimmerman, expert report of Yadin David	<input checked="" type="checkbox"/> Not Applicable.	<p>Plaintiffs' position. The Plaintiffs respectfully maintain there is a strong public interest afforded by both the First Amendment and common law in accessing court proceedings and records.</p>

See, e.g., *Ass. Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983); *NBC Subsidiary (KNBC-TV), Inc., v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999); *Mokhiber v. Davis*, 537 A.2d 1100, 1107 n.4 (D.C. 1988). As the party attempting to seek restrictions on public right of access to court proceedings, Defendants bear the burden of showing good cause to support access restrictions. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-86 (3d Cir. 1994) (noting good cause requires showing disclosure will cause a clearly defined and serious injury, which must be demonstrated with specificity) (quotations omitted). One of the relevant factors in considering whether to deny public access is whether confidentiality is being sought over information important to public health and safety. See *Glemmede Trust Co., v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

Defendants made no attempt to seal the proceedings, and have failed to demonstrate with specificity any clearly defined and serious injury that satisfies good cause requirement for sealing the Court proceedings and files. As the Defendants are aware, the press was present and taking notes throughout the duration of the three-day hearing.

Defendants' position. The Court has

				previously Ordered that Dr. David's report should remain under seal per Order of September 19, 2017 (Dkt. No. 854).
929	Exhibit 44 to Declaration of Genevieve Zimmerman, deposition of Karl Zgoda	X	Not Applicable.	
	Redactions to pp. 19-20	X	Not Applicable.	
	Redactions to pp. 22-26	X	Not Applicable.	
	Redactions to pp. 31-32	X	Not Applicable.	
	Redactions to pp. 42-43	X	Not Applicable.	
	Redactions to p. 45	X	Not Applicable.	
	Redactions to p. 47	X	Not Applicable.	
	Redactions to pp. 49-50	X	Not Applicable.	
	Redactions to p. 51	X	Not Applicable.	
	Redactions to pp. 52-54	X	Not Applicable.	
	Redactions to pp. 54-65	X	Not Applicable.	
	Redactions to pp. 66-71	X	Not Applicable.	
	Redactions to pp. 75-78	X	Not Applicable.	
	Redactions to pp. 80-81	X	Not Applicable.	

Redactions to pp. 84-88	X	Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected. The testimony in question deals with addressing customer concerns over filtration, including on the distal end of the hose and/or HEPA.</p>	<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>	Not Applicable.	Not Applicable.
Redactions to pp. 89-98	X					
Redactions to p. 100	X					
Redactions to pp. 102-114	X					
Redactions to pp. 116-117	X					
Redactions to pp. 128-135	X					

Redactions to pp. 142-145	X	Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected. The testimony in question has to do with filtration and the management of bacteria in the Bair Hugger.</p>	<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>
Redactions to pp. 146-148	X		Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as</p>

<p>nefarious and tainted by Augustine should be rejected. The testimony in question has to do with filtration efficiency and addressing bacteria in the Bair Hugger units.</p>	<p>Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.</p>
<p>Redactions to pp. 175-177</p>	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.</p> <p>Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected. The testimony in question here relates to consideration of an anti-microbial coating on the inside of the Bair Hugger hose, not to Augustine.</p>
<p>Redactions to pp. 183-187</p>	

			customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.	
Redactions to pp. 188-195	X	Not Applicable.	Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected. The line of testimony in question relates to Project Ducky, not to Augustine.	
Redactions to pp. 195-196	X		Defendants' position. These redactions should remain in place. The testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.	
Redactions to pp. 198-204	X	Not Applicable.		
919	Exhibit 45 to Declaration of Genevieve Zimmerman,	X	Not Applicable.	

	510(K) submission for Bair Hugger Patient Warming System				Plaintiffs' position. The Plaintiffs respectfully submit the public interest in accessing this document is significant. The internal email acknowledges Defendants' desire and intention to [REDACTED] which is information very important issues of public health and safety.
921	Exhibit 47 to Declaration of Genevieve Zimmerman, internal email chain regarding ECRI inquiry and response to Augustine allegations and Albrecht papers		X	Not Applicable.	Defendants' position. This document should remain under seal. <i>The Court previously ordered that this document should remain under seal when it was filed at Doc. No. 385. (See Order, Doc. No. 854.)</i> The document, entitled "Competitive Outline_v1.pptx," reflects internal correspondence among 3M employees relating to strategic planning. Defendants designated this document as Confidential under PTO 7 because it contains strategic planning information of competitive significance.

Dated: November 7, 2017

Respectfully submitted,

s/Benjamin W. Hulse

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